IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-866

M.J.D.M. TRUCK RENTAL, INC. & WILLIAM V. DE MAIO,
Petitioners,

v.

WILLIAM J. O'BRIEN, *Respondent.*

No. 75-887

THEMIS N. ANASTOS & HUGH M. MATCHETT,
Petitioners,

v.

WILLIAM V. DE MAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR., *Respondents.*

PETITION FOR A RE-HEARING OF THEIR PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes M.J.D.M. Truck Rentals, Inc. and William V. De Maio, Petitioners in Case No. 75-866 by their attorney Albert H. Beaver, and Themis N.

Anastos and Hugh M. Matchett, Petitioners in Case No. 75-887 by their attorney Hugh M. Matchett, and petition for re-hearing of their petitions for writ of certiorari to the United States Court of Appeals for the Seventh Circuit which were denied on February 23, 1976. This petition is being filed pursuant to Rule 58 (2) of the rules of this Court on substantial grounds available to petitioners although not previously presented.

This petition for re-hearing is due on or before March 12, 1976.

Hugh M. Matchett and Albert H. Beaver certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified.

FEDERAL AND STATE QUESTIONS PRESENTED

Whether the decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment, is a violation of petitioner's federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provisions would be unconstitutional under the Constitution of Illinois, Article I, Section 2, and under the 14th Amendment, Section 1, to the Constitution of the United States, in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws by the State of Illinois.

The decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment is a violation of petitioners' federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provision would be unconstitutional under the Constitution of Illinois Article 1, Section 2 providing "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."; and under the 14th Amendment, Section 1 to the Constitution of the United States providing: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."; in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws, by the state of Illinois. This Federal and State question was not raised in or passed on by the United States Court of Appeals for the Seventh Circuit, but it is submitted that we are within well recognized exceptions to the rule that this Court will not take jurisdiction and decide Federal questions when they have not been previously raised in litigation, in that the decision of the United States Court of Appeals came as a surprise and petitioners had no real opportunity to raise the constitutional question in their petitions for re-hearing in the Court of Appeals. This case is within the rule enunciated by this Court on several occasions, that where there has been "funda-

mental error" clearly determinative of the case, this Court will consider the issue even though it was not raised below (*Terminello v. City of Chicago,* 1949, 333 U.S. 1; *Silback v. Wilson & Co.,* 1941, 312 U.S. 1; *Mahler v. Ebby,* 1924, 264 U.S. 32.)

CONCLUSION

For the reasons stated, petitioners pray that the Court will issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit or, in the alternative will vacate its order denying their petitions for writ of certiorari, and will issue an order referring the Federal and State Constitutional question presented to the United States Court of Appeals for the Seventh Circuit, subject to review by this Court.

Respectively submitted,

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